No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31 ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION ET AL. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This brief is submitted with the consent of the parties,[1] on behalf of the National Education Association ("NEA"), 24 of NEA's state affiliates,[2] and the American Association of University Professors ("AAUP").

NEA is a nationwide employee organization with more than 3 million members, the vast majority of whom are employed as teachers in public schools and colleges throughout the United States. NEA has state affiliates in each of the 50 states and over 14,000 local affiliates in individual school districts, colleges, and universities throughout the United States. Where authorized by state law, thousands of NEA's local affiliates are parties to collective bargaining agreements that provide for the collection of agency fees.

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[1] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have filed letters granting blanket consent to the filing of amicus briefs.

[2] Those affiliates are the Arizona Education Association, California Teachers Association, Connecticut Education Association, Delaware State Education Association, Education Minnesota, Georgia Association of Educators, Illinois Education Association, Kansas NEA, Kentucky Education Association, Maine Education Association, Maryland State Education Association, Massachusetts Teachers Association, MEA-MFT (Montana), Michigan Education Association, NEA-Alaska, NEA-New Hampshire, NEA Rhode Island, New Jersey Education Association, Ohio Education Association, Oregon Education Association, Pennsylvania State Education Association, Vermont-NEA, Washington Education Association, and Wisconsin Education Association Council.

NEA, the California Teachers Association, and several of their local affiliates are defendants in *Yohn v. California Teachers Association*, currently stayed in the Central District of California (No. 8:17-cv-00202-JLS-DFM), which challenges a California law allowing school districts to enter into agency shop arrangements. Styling themselves the "California Public-School Teachers," the *Yohn* Plaintiffs have submitted an amicus brief in this case.

AAUP represents the interests of over 40,000 faculty, librarians, graduate students, and academic professionals, including a significant number in public-sector collective-bargaining units. AAUP defends academic freedom and the free exchange of ideas in higher education. In cases that raise legal issues important to higher education or faculty members, the AAUP frequently submits amicus briefs in the Supreme Court. *See, e.g., Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

INTRODUCTION AND SUMMARY OF ARGUMENT

Unlike their counterpart in the private sector, public-sector collective-bargaining laws vary from state to state in almost every particular and have changed—sometimes dramatically—over time. These variations reflect the considered, and often evolving, assessment of state and local governments of how best to manage their workforces for the efficient delivery of services to the public. Considering the important values of federalism at stake, and recognizing the paramount interest a government has in managing its own affairs, this Court has consistently deferred to the government's judgments when it acts as

an employer rather than as a regulator. As a result, courts at every level have routinely rejected constitutional challenges to various aspects of public-sector collective-bargaining laws.

The same result should obtain in Petitioner's broad challenge to a central feature of one of the most common forms of public-sector workforce organization: agency fees that support collective bargaining with an exclusive representative. Petitioner and his supporting amici claim that these arrangements—and, indeed, *any* workplace rules that compel public employees to speak or associate in connection with employment matters—are subject to the most demanding level of First Amendment scrutiny. But that standard finds no support in this Court's cases, which have consistently applied a lower level of scrutiny when the government manages its own operations and deals with its own employees.

Their claim that government may only proscribe, but not prescribe, workplace speech and association in employment matters reveals a fundamental disconnect with the controlling caselaw that accommodates the practical realities of government employment. The government does not hire employees to refrain from speaking or acting; it hires them to carry out government functions, often through speech and association with others. If a state or locality could not enact broad workplace rules to promote stable and productive government workplaces, and could not also compel its employees to cooperate with the implementation and execution of those rules, there would be little chance for the efficient provision of public services.

Petitioner and his supporting amici also sell short the significant, and even compelling, governmental interests served by robust collective bargaining sup-

ported by agency fees. In addition to the conventional interest in setting workplace terms through negotiations with a single, adequately financed bargaining representative, public employers are justified in relying on these arrangements to improve the quality of public services provided—including the educational improvements in public schools and universities that have been shown to accompany robust collective bargaining. The government also has a strong interest in ensuring that its choice of workplace organization does not impose negative externalities on the public in the form of the reduced economic mobility and opportunity that accompany low levels of union density.

Finally, Petitioner and his amici misstate the risk that the elimination of agency fees, and the corresponding introduction of the "free rider" problem, pose to the government's interest in collective bargaining. If this Court rules in Petitioner's favor, well-financed groups—including several of Petitioner's own supporting amici—plan to weaponize that ruling by launching extensive campaigns targeted at public employees, urging them to drop their union membership. The avowed purpose of these campaigns is to deliver a "mortal blow" to public-sector unions and "finish them off for good." Whether these efforts will ultimately succeed is beside the point. State and local governments are entitled to take reasonable measures to address, not only the concern that a "mortal blow" will actually occur and thereby eliminate the union's capacity to bargain, but the disruption and disharmony that could reasonably be expected to arise in efforts to deliver that blow. For all of these reasons, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should remain the law.

ARGUMENT

A public employer—whether it is a school, hospital, university, or transit system—must hire, train, manage, discipline, and retain a skilled workforce, and must provide compensation that is fair and competitive. As with many challenges that face state or local governments, "considerable disagreement exists about how best to accomplish th[ose] goal[s]." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Some jurisdictions have opted to make all personnel decisions unilaterally, in part by *ad hoc* decision-making, in part by internal policies or directives, and in part by prescriptive lawmaking in the form of statutes and regulations. But other jurisdictions have made the judgment that there are advantages to public employers and employees alike in a system under which some of the terms and conditions of employment are the product of agreement rather than fiat. In these fundamental differences of approach to personnel relations, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Id.*

Petitioner's constitutional challenge to a key feature of a common form of public-sector workforce organization—agency fees that support collective bargaining with an exclusive representative—should be rejected. Public-sector collective-bargaining arrangements in this country come in a variety of shapes and sizes, and they have evolved over time. These arrangements, however, have never been understood to implicate the kinds of First Amendment or other constitutional concerns that apply when the government regulates private speech or conduct. Instead, in deciding whether to allow collective bargaining, and on

what terms, the government has received the broad deference that traditionally applies to the "dispatch of its own internal affairs." *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 896 (1961).

The same should occur here. Illinois' decision to authorize and execute an agency-fee arrangement is more than justified by its interest as employer in securing the benefits of collective bargaining. This Court should reject the efforts of Petitioner and his supporting amici to upend controlling First Amendment principles, to disparage a government's strong interest in robust collective bargaining, and to dismiss the harm that could reasonably be expected to occur if agency fees were declared unlawful.

I. Laws That Regulate Public-Sector Labor Relations Have Evolved Over Time and Vary Enormously in Their Particulars

Public employees have organized themselves into unions and petitioned their employers for better wages and working conditions for most of America's history. In the 1830s, both state and federal workers petitioned for a ten-hour workday.[3] Postal workers mounted organizing campaigns in the late nineteenth century.[4] Labor organizing among public employees was widespread by the turn of the twentieth century, and by the 1930s public-sector union membership rates were not markedly lower than in the private sector.[5]

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[3] Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900-1962* 16 (2004) ("Slater, *Public Workers*" herein).

[4] *Id.*

[5] *Id.* at 3.

In 1959, Wisconsin became the first state to enact a public-employee relations act.[6] Like the National Labor Relations Act (NLRA), it provided for the right to organize and engage in bargaining over "wages, hours, and conditions of employment," and it contained provisions concerning unfair labor practices.[7] But it did not permit strikes or contain a mechanism for resolving impasses.[8] Over the next seven years, fifteen more states enacted bargaining laws covering at least some categories of public employees.[9] And by 2007, all but seven states allowed bargaining by at least some groups of public employees.[10]

Most public-sector bargaining laws were—and still to this day remain—more deferential to management control than the NLRA.[11] For example, the overwhelming majority of these laws prohibited strikes and contained a narrower scope of bargaining than the NLRA.[12]

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[6] *Id.* at 158–59. *See also* 1959 Wis. Laws ch. 509; Daniel M. Rosenthal, *Public Sector Collective Bargaining, Majoritarianism, and Reform*, 91 Or. L. Rev. 673, 684 (2013) (describing Wisconsin as the first state to enact a public-sector bargaining law).

[7] Slater, *Public Workers* at 181–84.

[8] *Id.* Impasse procedures were added in 1962. *Id.* at 186–89.

[9] *Id.* at 191.

[10] Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 Hofstra Lab. & Emp. L.J. 511, 512–13 (2013).

[11] Jeffrey H. Keefe, *A Reconsideration and Empirical Evaluation of Wellington's and Winter's, The Unions and the Cities*, 34 Comp. Lab. L. & Pol'y J. 251, 252 (2013) (observing that while state bargaining laws often replicate portions of private-sector law, no state has transplanted it wholesale).

[12] *Id.* at 264; Slater, *Public Workers* at 198.

Since the financial crisis of 2007 and the ensuing Great Recession, the pendulum began to swing the other direction. In the past decade, state legislatures have scaled down pensions, cut wages, and curtailed bargaining rights.[13] Most notably, in 2011, Wisconsin dramatically narrowed bargaining rights for most types of public employees through a law known as Act 10.[14] While the bill retained fairly robust bargaining provisions for police, firefighters, and other "public safety" employees, it restricted bargaining for all other public-sector employees to the single topic of base wages and required annual recertification of their bargaining representatives by the vote of a majority of employees in the unit.[15]

A number of other states, including Tennessee, Indiana, Michigan and Ohio also enacted sweeping changes to their bargaining laws in 2011. In Tennessee, the legislature replaced the state's more traditional bargaining law for public-school teachers with a new "collaborative conferencing" statute that eliminates exclusive representation altogether and replaces it with a conference at which employers discuss a narrowly-drawn list of topics with multiple stakeholders, subsequent to which the employer may act unilaterally on any issue.[16] The Indiana and Michigan statutes both substantially narrow the scope of

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[13] *See generally* Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 Hofstra Lab. & Emp. L.J. 407 (2012).

[14] 2011–2012 Wis. Legis. Serv. Act 10.

[15] *Id.*; *see also* Dau-Schmidt & Lin, *supra* note 13 at 417–19.

[16] 2011 Tenn. Laws Pub. Ch. 378 (codified at Tenn. Code § 49-5-601 *et seq.*).

bargaining.[17] The Indiana statute, in particular, limits the scope of bargaining to just salary and wages—and even, as to those, only within the parameters allowed by detailed statutory provisions—as well as related fringe benefits such as health insurance and paid time off.[18] In Ohio, the state legislature passed amendments to the bargaining law to prohibit bargaining over most non-wage subjects,[19] but voters later overturned those amendments at the ballot box.[20]

After 2011, states continued to make numerous changes to public-employee bargaining laws. For example, in 2012, Michigan enacted a "right to work" law that prohibits agency fees for most public and private sector employees.[21] Connecticut restricted bargaining over teacher evaluations and retirement incentive plans.[22] Nevada and Indiana added additional procedures for ratifying bargaining agreements.[23] Iowa narrowed the scope of mandatory bargaining subjects significantly and imposed substan-

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[17] 2011 Mich. Legis. Serv. P.A. 103; 2011 Ind. Legis. Serv. P.L. 48-2011.

[18] *See* Ind. Code § 20-29-6-7.

[19] S. 5, 29th Gen. Assemb. (Ohio 2011). *See also* Dau-Schmidt & Lin, *supra* note 13 at 420 (discussing major legislative developments after the 2010 midterm elections).

[20] Martin H. Malin, *Sifting Through the Wreckage of the Tsunami That Hit Public Sector Collective Bargaining*, 16 Emp. Rts. & Emp. Pol'y J. 533, 538 (2012).

[21] 2012 Mich. Legis. Serv. P.A. 349 (codified at Mich. Comp. Laws § 423.210) (retaining agency fees for police and fire department employees).

[22] Conn. Gen. Stat. § 10-153d(b).

[23] 2015 Ind. Pub. Law 213-2015 § 188; 2015 Nevada Laws Ch. 84.

tial restrictions on the selection and retention of certified bargaining representatives.[24] Several states enacted or expanded laws allowing bargaining agreements to be reopened or abrogated in the event of fiscal or academic "distress."[25] And numerous states restricted the scope of bargaining.[26]

While the post-recession changes to bargaining laws are unique in their scale, changes to bargaining laws are nothing new. Compared with the NLRA, which has remained relatively stable over time, since their inception public-sector labor laws have "experienced much wilder swings back and forth: not only through agency interpretation, but also through significant rewriting of statutes, and the creation and elimination of statutes,"[27] as states tailor their laws. In Wisconsin, for example, dozens of changes have been made to the bargaining law since its initial enactment in 1959. These changes ranged from minor and technical amendments, to removing a sunset provision,[28] to substantially altering the list of prohibited bargaining topics,[29] to the full-scale overhaul that took place in 2011.[30]

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[24] *See* 2017 Iowa Legis. Serv. Ch. 2 (H.F. 291).

[25] *See, e.g.*, 2012 Mich. Legis. Serv. P.A. 436 (codified at Mich. Comp. Laws § 141.1541 *et seq.*); 2015 Nevada Laws Ch. 490 (codified at Nev. Rev. Stat. § 288.150(3)(a)-(d), (4)); 2015 Ohio Laws File 22 (codified at Ohio Rev. Code § 3302.10).

[26] *See, e.g.*, 2015 Kan. Laws 92 (restricting scope to wages and hours, plus three topics each party may choose from a list).

[27] Slater, *supra* note 10 at 512.

[28] 1973 Wis. Laws ch. 64.

[29] 1995 Wis. Laws ch. 27, § 9320.

[30] 2011–12 Wis. Legis. Serv. Act 10.

Development of public-employee bargaining law in some states has defied national trends. For example, even as Wisconsin enacted the first bargaining law in 1959, North Carolina passed a law prohibiting organizing by public employees, and forbidding public employers from reaching bargaining agreements or other "understandings" with their employees.[31] And even as many states have curtailed bargaining rights over the last decade, Minnesota created a new state labor board and expanded public employees' right to organize, and Maryland removed a sunset provision in its law in order to make its state labor board permanent.[32]

Today, there continues to be tremendous variety in bargaining regimes between states.[33] Existing laws vary in every particular, from whether bargaining is allowed at all, to proper subjects of bargaining, to when and how bargaining must be conducted. The bargaining regimes covering NEA's own members illustrate this diversity. In the context of K-12 teachers,[34] thirty-four states and the District of Columbia

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[31] Slater, *Public Workers* at 164.

[32] *See* 2014 Minn. Sess. Law Serv. Ch. 211 (creating rights similar to those under Section 7 of the NLRA); 2014 Maryland Laws Ch. 369.

[33] *See generally* Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Labor Law Spectrum*, 18 Cornell J.L. & Pub. Pol'y 735 (2009) (comparing laws in Illinois and Virginia).

[34] We discuss K-12 teachers here for simplicity's sake. Some states cover all public employees under one public-employee relations act; others cover education employees under a separate bargaining law; and still other states cover various types of education employees—such as teachers, support professionals, and higher education employees—under three or more separate bargaining laws. *Cf.* Slater, *Public Workers* at 96 (estimating that

(*continued* . . .)

require school boards to recognize and bargain with units of teachers that demonstrate majority employee support;[35] nine states permit, but do not require, public employers to recognize and bargain with an exclusive representative;[36] one state provides for recognition of and "conferencing" with multiple employee groups, each of which must demonstrate a threshold level of support;[37] and six states prohibit bargaining altogether.[38]

Among the states that allow teachers to bargain, the scope of bargaining varies widely. At one end of the spectrum, Wisconsin restricts bargaining for most public employees, including teachers, to the sole issue of total base wages. At the other end of the spectrum, the bargaining laws that apply to public school teachers in Rhode Island and Washington broadly require bargaining over wages, working, conditions, and terms and conditions of employment, without specifying any permissive or prohibited topics of bargaining.[39] Many states expressly prohibit bargaining on issues like pensions,[40] layoffs,[41] dismissals for

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there were around 110 laws covering various categories of public employees as of 2004).

[35] *See, e.g.*, Cal. Govt. Code §§ 3540–3549.3.

[36] *See, e.g.*, *Fayette County Educ. Ass'n v. Hardy*, 626 S.W.2d 217, 219 (Ky. App. 1980).

[37] *See* Tenn. Code §§ 49-5-601–49-5-609.

[38] *See*, e.g., Tex. Gov't Code § 617.002.

[39] R.I. Gen. Laws § 28-9.3-2; Wash. Rev. Code § 41.59.020(2).

[40] *See, e.g.*, Haw. Rev. Stat. Ann § 89-9(d); N.J. Stat. § 34:13A-8.1. *See also* Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 Ind. L.J. 189, 193, 203 (2012) (noting that while public-sector unions and bargaining laws are frequently blamed for pension deficits, "in the vast majority of jurisdictions,

(*continued* . . .)

cause,[42] and evaluations,[43] or such issues are removed from the realm of bargaining by separate statutes with which bargaining agreements may not conflict.[44]

State laws also vary tremendously in regulating the bargaining process itself. Statutes may permit, or require, that bargaining impasses be resolved via mediation, fact-finding, binding arbitration, economic action, or some combination of these—and it may impose various requirements and deadlines on resolution proceedings, or none at all.[45]

Finally, state bargaining laws differ as to whether they allow, or do not allow, agency fees for education employees. At present, twenty-two states and the

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public sector unions are not even permitted to bargain about pensions," which are governed by separate statutes).

[41] *See, e.g.*, 105 Ill. Comp. Stat. § 5/24-12 (career status cannot be the primary factor in layoffs); Nev. Rev. Stat. § 288.151; Tenn. Code § 49-5-608 (b)(5).

[42] *See, e.g.*, Ind. Code § 20-29-6-4.5; Iowa Code § 20.7.

[43] *See, e.g.*, Conn. Gen. Stat. § 10-153d(b); D.C. Code §§ 1-617.08(b), 1-617.18; Tenn. Code § 49-5-608 (b)(3).

[44] *See, e.g.*, *Bd. of Educ. of Round Valley Unified Sch. Dist. v. Round Valley Teachers Ass'n*, 914 P.2d 193, 205 (Cal. 1996) (the provision of a collective-bargaining agreement cannot conflict with the requirements of the Education Code, which governs, layoffs, evaluations, and dismissals).

[45] *See, e.g.*, N.D. Cent. Code § 15.1-16-15 (permitting mediation or fact-finding, but leaving its use to the discretion of the parties); Del. Code tit. 14, §§ 4014–4015 (providing that mediation must be initiated if no agreement is reached within 30 days of an existing agreement's expiration, and arbitration must be initiated if the dispute is not resolved after a reasonable period of mediation); Pa. Stat. tit. 24, §§ 1121-A–1125-A (laying out detailed requirements for the mandatory use of mediation, fact-finding, and arbitration).

District of Columbia permit the collection of agency fees for K-12 teachers, while twenty-eight states prohibit them.[46] As with many other aspects of public sector labor law, there are states that have chosen to allow agency fees for certain categories of employees—such as public safety employees—and prohibit them for teachers, as in Wisconsin.[47] And there are other states, as noted above, that have changed positions on the issue over time.

II. Public-Sector Collective-Bargaining Laws—Including Those Providing for Agency Fees—Are Not Subject to Elevated Constitutional Scrutiny

Petitioner and his supporting amici contend that the terms and conditions of employment established by the nation's diverse collection of public-sector labor laws implicate matters of the utmost public concern and, more to the point, that public employees' workplace speech and associational activity occurring in connection with those laws must receive the highest level of constitutional protection. *See* Petitioner's Brief at 19–22; Brief of Amicus United States at 12–15; Brief of Amici California Public-School Teachers ("CPST") at 6–14. Neither history nor reason can sustain that claim. The exacting scrutiny Petitioner asks for "finds no support" in this Court's cases, which have "consistently applied a lower level of scrutiny" when the government manages its own operations and deals with its own employees. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 98 (1990) (Scalia, J., dissenting).

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[46] *See* Brief of Respondent Union at 2.

[47] Wis. Stat. § 111.70(1)(f), (2).

A. As this Court has recognized, "there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage its internal operation"—a difference that is "particularly clear" in "the context of public employment." *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (cleaned up[48]); *see also Rutan*, 497 U.S. at 94 (1990) (Scalia, J., dissenting) (recognizing this difference in constitutional analysis "in many contexts, with respect to many different constitutional guarantees"). When the government is acting as a proprietor, rather than regulator, "the government's interest in achieving its goals as effectively and efficiently as possible" is elevated from "a relatively subordinate interest" to a "significant one." *Engquist*, 553 U.S. at 598–99 (cleaned up).

As a result, this Court and others have recognized that the various features of public-sector labor-relations laws are not amenable to constitutional challenges by employees or their union representatives. Instead, decision after decision has confirmed the government's broad authority to determine for each of its various workforces issues such as: whether to permit collective bargaining in the first instance;[49] which entity shall serve as bargaining representa-

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[48] *See generally* Jack Metzler, *Cleaning Up Quotations*, J. App. Prac. & Process (forthcoming 2018), https://perma.cc/43XE-96W5.

[49] *See Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 291–92 (1984) (rejecting public employees' First Amendment challenge to a statute requiring public employers to engage in official exchanges of views only with their professional employees' exclusive representatives on employment-related policy questions).

tive;[50] the manner in which a representative may be selected or removed;[51] which topics will be covered by bargaining;[52] which employees will be allowed to select a representative for bargaining;[53] the composition

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[50] *See Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs of the City of Indianapolis*, 101 F.3d 1179, 1181–82 (7th Cir. 1996) (rejecting Equal Protection challenge to school district's decision to recognize an exclusive representative without ascertaining its support among the represented employees); *Phila. Fraternal Order of Corr. Officers v. Rendell*, 736 A.2d 573, 577 (Pa. 1999) (rejecting claims that it violates the First Amendment or Equal Protection Clause for "a public employer to force its employees to be represented by a union chosen solely by the public employer and against the will of the employees").

[51] *See Babbitt v. United Farm Workers*, 442 U.S. 289, 312–13 (1979) (rejecting First Amendment challenge to statutory election procedures for a collective-bargaining representative); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 656 (7th Cir. 2013) (rejecting Equal Protection challenge to statute requiring annual recertification of the exclusive representative by a majority of the employees in the bargaining unit).

[52] *See Laborers Local 236 v. Walker*, 749 F.3d 628, 634–40 (7th Cir. 2014) (rejecting First Amendment and Equal Protection challenges to statute prohibiting employers from reaching binding agreements with employees' representatives on any subject other than employees' base wages); *Wis. Educ. Ass'n Council*, 705 F.3d at 654–56 (rejecting Equal Protection challenge to the same provision); *see also Mich. State AFL-CIO v. Emp't Relations Comm'n*, 551 N.W.2d 165, 173–74 (Mich. 1996) (rejecting First Amendment challenge to statute prohibiting public employers from collectively bargaining certain subjects).

[53] *See Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 127–29 (1999) (per curiam) (rejecting Equal Protection challenge to the exclusion of university professors from the otherwise general collective-bargaining scheme for public employees); *Am. Fed'n of Gov't Employees v. Loy*, 281 F. Supp. 2d 59, 65 (D.D.C. 2003) (rejecting First Amendment and Equal Protection challenges to administrative action excluding airport security screeners from collective bargaining), *aff'd*, 367 F.3d 932 (D.C. Cir. 2004); *State Mgmt. Ass'n of Conn., Inc. v. O'Neill*, 529 A.2d

(*continued* . . .)

of units for bargaining,[54] whether to grant the representative privileged access to the worksite or other channels of workplace communication;[55] whether to ensure that the representative can obtain resources for support of its bargaining activities;[56] whether to allow strikes in support of the representative's demands;[57] or even whether to prohibit bargaining alto-

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1276, 1278–80 (Conn. 1987) (rejecting Equal Protection and Due Process challenges to statute excluding managers from collective bargaining and union representation).

[54] *Univ. Prof'ls of Ill., Local 4100 v. Edgar*, 114 F.3d 665, 667–68 (7th Cir. 1997) (rejecting Equal Protection challenge to statute consolidating faculty representation on different university campuses into one bargaining unit).

[55] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–49 (1983) (rejecting First Amendment challenge to school policy allowing certified representative—but not a rival union—access to school mailboxes); *Memphis Am. Fed'n of Teachers, Local 2032 v. Bd. of Educ. of Memphis City Sch.*, 534 F.2d 699, 702–03 (6th Cir. 1976) (rejecting First Amendment and Equal Protection challenge to school policy granting exclusive privileges to recognized union with respect to school bulletin boards and mail service, use of school facilities for meetings, access to schools by persons not assigned to those schools, leave policy, and the right to make announcements at faculty meetings).

[56] *See Abood*, 431 U.S. at 224–31 (rejecting First Amendment challenge to agency fees that support the representative's activities germane to collective bargaining); *see also City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 286 (1976) (rejecting Equal Protection challenge to public employer's refusal to allow payroll deductions for union dues); *Wis. Educ. Ass'n Council*, 705 F.3d at 645–53, 657 (rejecting First Amendment and Equal Protection challenges to statute eliminating payroll deductions of union dues for certain categories of public employees); *Bailey v. Callaghan*, 715 F.3d 956 (6th Cir. 2013) (same).

[57] *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 882 (D.D.C.) (holding that public employees have no constitu-

(*continued* . . .)

gether.[58] These decisions reflect the significant deference due to the government's "choice of an organizational structure" that it deems to be most effective for managing its workforce. *Kelley v. Johnson*, 425 U.S. 238, 246 (1976) (plurality opinion).

B. Petitioner and his supporting amici make only a limited attempt to grapple with this body of law establishing the government's elevated "interests as an employer in regulating the speech of its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

Their primary argument on this point is that, while the *Pickering* line of cases may apply to circumstances that involve a *restriction* on public-employee speech, it does not extend to cases involving *compulsion* of workplace speech or activity. *See* Pet. Br. at 24 ("The government's interest as an employer in preventing employee expressive activities from interfering with workplace operations cannot justify forcing employees to support expressive activities"); *see also* U.S. Br. at 24; CPST Br. at 15–16. They argue that compelling the speech of public employees is in some sense "worse" than restricting it, and that a higher

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tional right to strike), *aff'd*, 404 U.S. 802 (1971); *Bennett v. Gravelle*, 451 F.2d 1011, 1012–13 (4th Cir. 1971) (same); *Mich. State AFL-CIO*, 551 N.W.2d at 174 (same).

[58] *See Smith v. Ark. State Highway Emp., Local 1315*, 441 U.S. 463, 465 (1979) (rejecting First Amendment challenge to employer's refusal to allow collective bargaining); *Fraternal Order of Police v. Mayor & City Council of Ocean City*, 916 F.2d 919, 921–24 (4th Cir. 1990) (same with regard to city charter provision mandating that no employee organization should be recognized as bargaining agent or representative of city employees); *see also Hanover Twp. Fed'n of Teachers, Local 1954 v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 461 (7th Cir. 1972) (Stevens, J.) ("there is no constitutional duty to bargain collectively with an exclusive bargaining agent") (cleaned up).

level of constitutional scrutiny must therefore apply. CPST Br. at 15.

This Court has already recognized that the distinction Petitioner and his supporting amici seek to draw is an empty one "without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C, Inc.*, 487 U.S. 781, 796 (1988). But more to the point, their suggestion that the government may only *proscribe*—but not *prescribe*—workplace speech reveals a fundamental disconnect between their arguments and "the practical realities of government employment." *Waters v. Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion).

An example offered by Amici California Public-School Teachers ("CPST") unwittingly proves the point. Looking to the public-school context, they observe:

> On the one hand, public schools have broad power to prohibit the utterance of a disruptive message, say by disciplining a student for unfurling a banner urging drug use. On the other hand, public schools lack similar power to compel the support of a favored message, say by disciplining a student for failing to salute the flag.

CPST Br. at 16 (citing *Morse v. Frederick*, 551 U.S. 393, 410 (2007), and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

As true as this may be for public-school *students*, Amici CPST seems unaware that the same constitutional principles would not apply to an *employee* in a public elementary or secondary school setting. Instead, that employee could be subject to discipline or termination even for on-the-job speech that is *not* disruptive. *See Garcetti v. Ceballos*, 547 U.S. 410, 420

(2006) (extending no constitutional protection "when public employees make statements pursuant to their official duties"). And, more fundamentally, a school employee, unlike a student, *could* face adverse action for failing to lead the Pledge of Allegiance.[59] *See Palmer v. Bd. of Educ. of City of Chicago*, 603 F.2d 1271, 1274 (7th Cir. 1979); *see also Kelley*, 425 U.S. at 245–46 (plurality opinion) (observing that there is no constitutional constraint on a police department requiring its officers to salute the flag while in uniform). In other words, the context of public employment changes everything.

That is because, at bottom, public employment is an extended exercise in compelled speech and association. The government does not hire employees to refrain from speaking or acting; it hires them to carry out government functions, often through speech and association with others. These government functions frequently involve matters of significant public concern, and in order to see their goals accomplished, government employers exercise a "significant degree of control over their employees' words and actions." *Garcetti*, 547 U.S. at 418.

The arguments of Petitioner and his supporting amici are blind to this reality. Indeed, if this Court were to adopt their misguided position, a host of

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[59] As this Court noted in *Garcetti*, the general principles applied to public employment in that case do not necessarily decide what rights teachers and scholars have in the exercise of their academic freedom. 547 U.S. at 425. Since then, several courts have recognized that "teaching and academic writing" receive a higher degree of constitutional protection than ordinary workplace speech. *See Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014); *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011).

workforce-management practices that are common in the public sector would be called into question.[60] For example, "exacting scrutiny" would presumably apply to public-sector workplace rules requiring employees to report instances of workplace harassment, corruption, or other misconduct; requiring them to participate actively in workplace team-building or human-resources trainings; or requiring them to respond to inquiries from the public about government services and programs. If a state or locality could not enact broad workplace rules to promote stable and productive government workplaces, and could not also compel its employees to cooperate with the implementation and execution of those rules, "there would be little chance for the efficient provision of public services." *Id.*

C. Beyond the examples already cited, Petitioner and his supporting amici give scant attention to this most "basic principle[]" that the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist*, 553 U.S. at 599. Instead, their arguments rely largely on cases dealing with the government acting, not as a proprietor managing its own affairs, but as a sover-

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[60] Accepting their position would also make a hash out of this Court's "government speech" doctrine. Under Petitioner's view, an employee hired to communicate government messages on matters of public concern would presumably have a constitutional right of the highest order to refuse to participate in furthering a message that is contrary to his beliefs. But, as this Court has observed, if the First Amendment restricted "government statements (and government actions and programs that take the form of speech)," then "government would not work." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015).

eign regulating private speech and association. *See, e.g.*, Pet. Br. at 19–21. Their attempt to import those cases into the public-employment context fails at the threshold because the practice they challenge—a requirement for non-member employees to financially support the workplace representation they receive from the exclusive bargaining agent—has "no relevant analogue to speech by citizens who are not government employees." *Garcetti*, 547 U.S. at 424.

Typical of their confusion on this point is Amici CPST's claim that authorization for agency fees in the public sector is inconsistent with the "basic purposes of the First Amendment," CPST Br. at 14,[61] notwithstanding this Court's frequent recognition that even the "most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees." *Waters*, 511 U.S. at 672 (plurality opinion); *see also Garcetti*, 547 U.S. at 423-24.

While Amici CPST is undoubtedly right that the First Amendment's "mistrust" of governmental power insulates private citizens against various forms of state-enforced orthodoxy, CPST Br. at 14 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)), the same does not hold true in the regulation of public employment, including through collective bargaining supported by agency fees. As this Court has observed, if the government is to perform its responsibilities

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[61] The same amici likewise miss the mark in claiming a supposed historical basis for extending robust First Amendment scrutiny to a government's regulation of the workplace speech and conduct of its own employees. CPST Br. at 16–18. On the contrary, the notion that public employees have any constitutional rights at all is one of fairly recent vintage. *See* Resp Union Br. at 2–3.

"effectively and economically," it must have "wide discretion and control over the management of its personnel and internal affairs," *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring), including the prerogative to promote "discipline and morale in the work place," *Connick v. Myers*, 461 U.S. 138, 151 (1983); *see also Kelley*, 425 U.S. at 246 (plurality opinion) (noting that restrictions on public employees that would be unconstitutional if applied to the populace at large can be justified by the employer's "overall need for discipline, esprit de corps, and uniformity").

Likewise, the First Amendment surely protects private citizens against government regulation that distorts the "marketplace of ideas." CPST Br. at 15. But that is not the case for a government employer that, in matters of workplace speech, may prefer "a command economy" over "the free market of ideas." *Waters*, 511 U.S. at 673 (plurality opinion). And, of course, such an employer may prefer to establish working terms in cooperation with a single, duly-selected bargaining representative, rather than unilaterally or through negotiations with individual employees. *See Knight*, 465 U.S. at 291–92.

When a government employer recognizes an exclusive bargaining representative, that representative "assume[s] an official position in the operational structure" of the workplace that affects all of the employees in the bargaining unit. *Perry Educ. Ass'n*, 460 U.S. at 49 n.9. Under the First Amendment principles applicable to public employment—and largely ignored here by Petitioner and his supporting amici here—it was "within reasonable limits" for the State of Illinois to conclude that a statute authorizing agency fees would facilitate effective bargaining and promote workplace fairness. *United Public Workers v.*

Mitchell, 330 U.S. 75, 96 (1947); *see also Abood*, 431 U.S. at 224–25.

III. Petitioner and His Supporting Amici Fail to Appreciate the Governmental Interests Served by Robust Collective Bargaining Supported by Agency Fees

Just as Petitioner and his supporting amici underestimate the government's legal authority to regulate its workforce through collective bargaining supported by agency fees, so too do they misconstrue the significant—and even compelling—governmental interests served by those arrangements.

This Court has already recognized the government's overriding interest in the exclusive-representation model of bargaining to establish workplace terms and conditions. *See Knight*, 465 U.S. at 291 (noting that "the goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when negotiating"); *Abood*, 431 U.S. at 224 (referencing the "confusion and conflict" that could result from negotiating with multiple groups of employees). This arrangement could not accomplish the "important government interests" for which it has been authorized if the exclusive representative were not adequately funded. *Abood*, 431 U.S. at 225. And, if employees were free to share in the benefits of the representative's efforts at no charge, adequate funding obviously could be imperiled. Agency-fee arrangements are therefore a reasonable governmental measure for addressing that "free-rider" concern and distributing "fairly the cost of these activities among those who benefit." *Id.* at 222.

But the government's interest in pursuing robust collective bargaining with an adequately funded ex-

clusive representative is not limited to these conventional considerations. Many states strive to be model employers and see collective bargaining as central to that commitment. *See, e.g.*, N.Y. Civ. Serv. Law § 200 (declaring a purpose of the state's public-sector bargaining law to be the promotion of "harmonious and cooperative relationships between government and its employees"). Several instructive examples show that this commitment can, in turn, meaningfully improve the provision of public services and avoid negative societal externalities that arise in its absence.

A. The government has a "special interest in elevating the quality of education," *Norwood v. Harrison*, 413 U.S. 455, 463 (1973), and evidence confirms that this interest is materially advanced by the kinds of collective-bargaining arrangements at issue here. In particular, school districts with robust collective bargaining and high levels of union density associated with agency fees are able to dismiss lower-performing teachers while retaining higher performers, which improves overall teacher quality and student performance.[62] Such arrangements permit school districts to carefully evaluate new teachers' performances during probationary periods and weed out ineffective teachers, while reaping the benefits of retaining experienced and effective ones.[63] The corresponding improvements in the overall quality of the teaching workforce lead, in turn, to substantial im-

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[62] Eunice S. Han, *The Myth of Unions' Overprotection of Bad Teachers: Evidence from the District-Teacher Matched Panel Data on Teacher Turnover* at 4–5 (Jan. 15. 2016), http://papers.nber.org/conf_papers/f83489/f83489.pdf.

[63] *Id.* at 29–37, 42–46.

provement in measures of student performance such as drop-out rates.[64]

The government reaps similar benefits from robust collective bargaining in higher education, where future generations of teachers are being trained. For example, a 2013 study comparing unionized and non-unionized graduate student employees in public universities in terms of faculty-student relations, academic freedom, and pay found that that the unionized cohorts reported higher levels of personal and professional support, and "had higher mean ratings on their advisors accepting them as competent professionals, serving as a role model to them, being someone they wanted to become like, and being effective in his or her role."[65]

As sure as the government has an interest in securing the improvements that robust collective bargaining contributes to important public services like education, it has a commensurate interest in avoiding damage to those services caused by a breakdown of collective bargaining. In the wake of Wisconsin's decision in 2011 to restrict bargaining and eliminate agency fees, teachers have received far lower compensation, turnover rates have increased, and teacher experience has dropped significantly.[66] The state has seen "reduced statewide student achievement on science and math in large part because it caused many experienced teachers to leave the profession and facil-

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[64] *Id.* at 37–42.

[65] *See* Sean E. Rogers et al., *Effects of Unionization on Graduate Student Employees: Student Relations, Academic Freedom, and Pay*, 66 ILR Rev. 487, 501 (2013).

[66] David Madland & Alex Rowell, *Attacks on Public-Sector Unions Harm States: How Act 10 Has Affected Education in Wisconsin* at 10–14 (Nov. 15, 2017), https://goo.gl/oM3ZVu.

itated the hiring of teachers away from more poorly performing schools to better-performing schools."[67] A state like Illinois can make the sensible and justifiable choice not to go down that same path.

B. Beyond the immediate provision of public services, the government also has an interest in conducting its operations in a way that does not create broad, negative externalities for society at large.

For example, state and local governments have an interest in refraining from conduct that reduces economic mobility and opportunity in the populations they serve. *Cf. Kelo v. City of New London*, 545 U.S. 469, 484 (2005) (noting that the promotion of economic opportunity and development is "a traditional and long-accepted function of government"). Studies show that children of union-member parents have improved outcomes compared to children of comparable non-union parents, especially when parents are low-skilled.[68] Not only do these children of union-member parents go on to attain higher levels of education and better health status, they earn higher incomes as well.[69]

But the high levels of union density that agency fees promote do not just benefit union members and their families. Children who grow up in communities

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[67] *Id.* at 3; *see also id.* at 14–17.

[68] Richard Freeman et al., *Bargaining for the American Dream: What Unions Do for Mobility* at 2, 12–13 (Sept. 2015) ("Freeman, *American Dream*" herein), https://goo.gl/1JGnsf; Richard Freeman et al., *How Does Declining Unionism Affect the American Middle Class and Intergenerational Mobility?*, NBER Working Paper No. 21638 at 8–15 (Oct. 2015) ("Freeman, *Intergenerational Mobility*" herein), http://www.nber.org/papers/w21638.pdf.

[69] *Id.*

with higher union density also have higher average incomes relative to their parents compared to children who grow up in communities with lower union density—even when they are not the children of union members themselves.[70] Furthermore, the higher wages that unionized workers generally command have positive spillover effects on their communities and the economy by driving economic growth, creating more taxable income, generating increased state revenues, and reducing the demand for public assistance. *See* Brief of Amici Social Scientists at 35, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016).

Collective bargaining supported by agency fees facilitates the government's management of its own workforce, enhances the provision of public services, and creates positive externalities for society at large. Under the First Amendment standard applicable to a government's ordering of its own affairs, Illinois' decision to authorize agency fees for its state employees is more than justified. To hold otherwise would deprive it and other state and local governments of their prerogative to conduct "experiments and pilot programs—real-world laboratories in which ideas can be assessed on the results they produce"—with the "benefit of the give-and-take of the political process and the flexibility of social experimentation that only the elected branches can provide." Neil Gorsuch, *Liberals 'N Lawsuits*, National Review Online (Feb. 7, 2005), https://goo.gl/9twgVs.

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[70] *See* Freeman, *American Dream* at 2 ("Indeed, union density is one of the strongest predictors of an area's mobility"); *see also id.* at 4–9; Freeman, *Intergenerational Mobility* at 15–20.

IV. Petitioner and His Supporting Amici Misstate Both the Risks Posed by Eliminating Agency Fees and the Deference Due to the Government in its Assessment of Those Risks

Petitioner and his supporting amici gainsay the risk to the government's interest in collective bargaining posed by the elimination of agency fees and the corresponding introduction of the "free rider" problem.[71] The story goes that this Court should not be concerned about the effect of a decision that constitutionally enshrines a national "right to work" requirement in the public sector because it would have only a small economic impact on the unions or their ability, which the government depends on, to operate as reliable negotiating partners. Current members, they say, will continue to pay dues—even though they can obtain the benefits of the union's representation for free—simply because they view the union's mission as "worthy of support." CPST Br. at 21.

This is not the story that is being told elsewhere, including by some of Petitioner's supporting amici. A

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[71] Amici CPST contends that discovery in the *Yohn v. California Teachers Association* litigation shows that unions are unable to produce evidence of actual harm that would accompany a ruling that declares agency fees unconstitutional. These claims are misleading at best. CPST cherry-picks from the discovery responses and also does not reveal that discovery in *Yohn* was at an early stage when the case was stayed by the district court in response to the grant of certiorari in this case. The record in *Yohn* is far from complete and does not include the expert witness testimony that will substantiate concerns about the harm to unions and their capacity to bargain effectively in the face of losing agency fees and precipitous membership loss motivated by free riding.

fundraising appeal by Amicus Freedom Foundation—a group that conducted extensive campaigns to encourage union membership resignations in the wake of this Court's decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014)—explains the group's plans to weaponize a decision in Petitioner's favor here:

> [W]e are gearing up in a major way to launch an extensive education and activation campaign to take full advantage of a favorable ruling in this historic case . . . .
>
> We've been pointing toward this moment for our entire existence . . . .
>
> [W]e know the unions won't go away without a fight. *They won't go away even with a fight. They won't go away until we drive the proverbial stake through their hearts and finish them off for good.*[72]

A fundraising appeal from the State Policy Network—a national organization that supports state-level "think tanks"[73]—promises to use a decision in Petitioner's favor to "deliver a mortal blow" to public-

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[72] Freedom Foundation Fundraising Letter (Oct. 2017) (on file with the author) (emphasis in original).

[73] *See* State Policy Network, *About State Policy Network*, https://spn.org/state-policy-network-about/. Several of the State Policy Network's "think tank" affiliates have submitted briefs in support of Petitioner here. *See* Brief of Amici Freedom Foundation & Economists; Brief of Amici Pacific Legal Foundation et al.; Brief of Amici Gregory J. Harnett et al.; Brief of Amici Jane Ladley & Christopher Meier; Brief of Amicus James Madison Institute; Brief of Amici Buckeye Institute et al.; Brief of Mackinac Center; *see also* State Policy Network, *Directory*, https://spn.org/directory/.

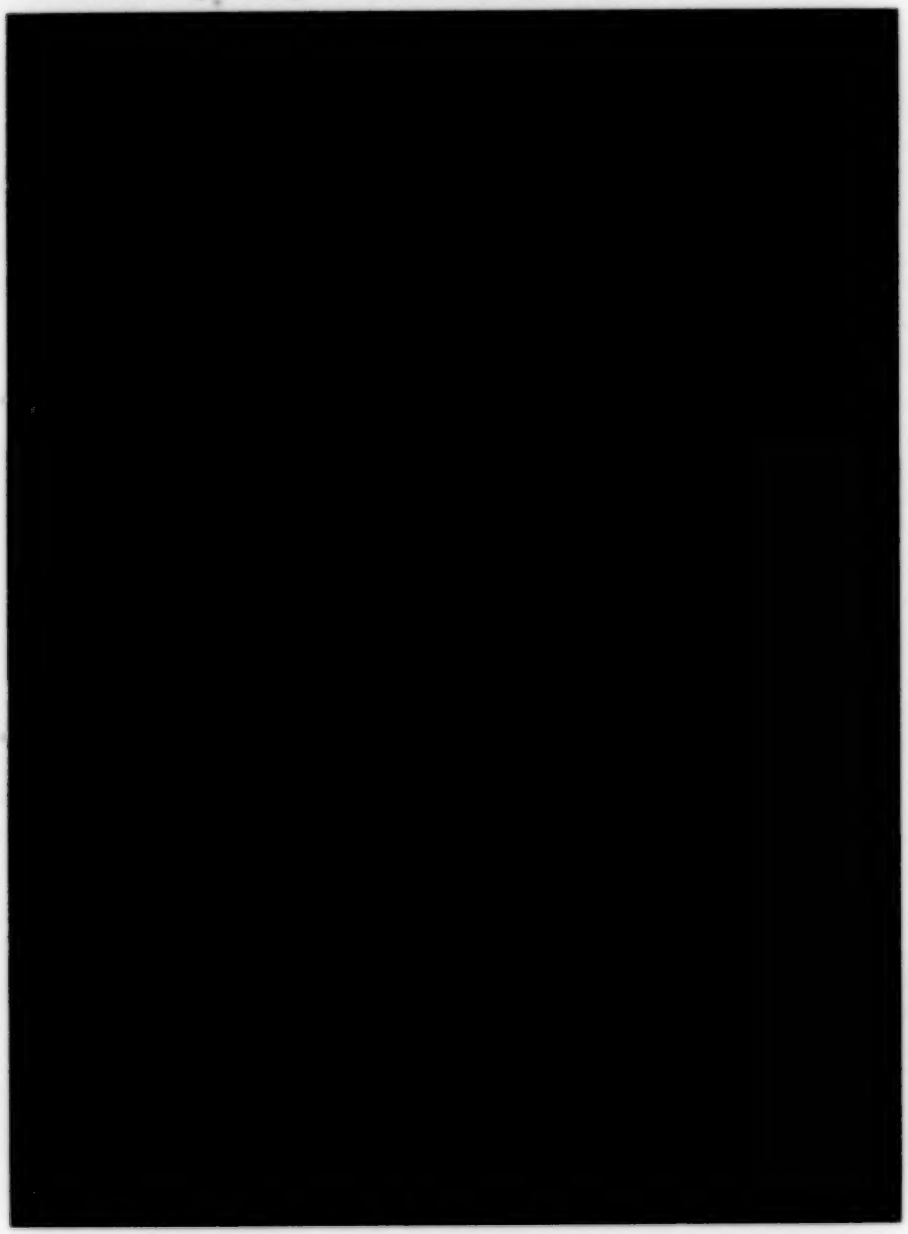
sector unions.[74] In the service of that goal, the State Policy Network has distributed a "State Workplace Freedom Toolkit" to its affiliates across the country to provide guidance on running campaigns to maximize union membership losses.[75]

The theme that animates these highly coordinated and well financed campaigns is not "spur[ring] debate about the value" of the union's services, CPST Br. at 22, but rather exploiting the very "free rider" problem that Petitioner and so many of his supporting amici minimize in their submissions to this Court. The campaigns actively urge members to reap all of the benefits of the union's representation without having to pay the cost. For example, the Freedom Foundation sent this piece of literature to union members in Washington State in the wake of this Court's ruling in *Harris*:

[74] Andrea Germanos, "Internal Documents Reveal Right-Wing Plan to Strike Public Unions With 'Mortal Blow,'" *Common Dreams* (Aug. 30, 2017), https://goo.gl/bVEzVa.

[75] *Id.*; *see also* State Policy Network, *State Workplace Freedom Toolkit*, https://goo.gl/5SuWRP.

These campaigns also tell union members that the "free rider" problem is unavoidable and urge them to resign before they become increasingly responsible for paying the representation costs of their free-riding coworkers. One example of a Freedom Foundation mailer from the same campaign presents the following image of a sinking ship:



It does not matter if these efforts would ultimately succeed in delivering to public-sector unions the "mortal blow" they promise. This Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 511 U.S. at 673 (plurality opinion). An employer need not wait for "tangible, present interference" with its operations; it may take action to prevent "speculative" harms based on "reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Id.*

Accordingly, the maintenance of agency-fee arrangements is more than justified—not only by the concern that a "mortal blow" will actually occur and thereby eliminate the union's capacity to bargain—but also by the need to avoid the disruption and disharmony that could reasonably be expected to arise in efforts to deliver that blow. *See id*; *Abood*, 431 U.S. at 222–24.

This Court's decision in *Abood* is, and should remain, good law. The government is fully justified in ordering its own workplace affairs through collective bargaining with an exclusive representative. And in order to secure that arrangement, the government is equally justified in authorizing and entering agency-fee arrangements that ensure the financial stability of its collective bargaining partner. Such a result is fully consistent with the First Amendment, which grants the government the "widest latitude" in conducting its own internal affairs. *Sampson v. Murray*, 415 U.S. 61, 83 (1974). The Petitioner's claim should therefore be rejected and the judgment below affirmed.

CONCLUSION

The judgment of the court of appeals below should be affirmed.

Respectfully submitted,

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